U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: San Francisco Date: AUG 22 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(i) of the Immigration and Nationality Act, 8 U.S.C. 1182(i)

IN BEHALF OF APPLICANT: [redacted]

Public Copy
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The waiver application was denied by the Acting District Director, San Francisco, California, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is before the Associate Commissioner on a motion to reopen. The motion will be dismissed and the order dismissing the appeal will be affirmed.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States under § 212(a)(6)(C)(i) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation in April 1986. The applicant married a native of the Philippines and naturalized U.S. citizen in 1997 and she is the beneficiary of an approved petition for alien relative. The applicant seeks the above waiver in order to remain in the United States and reside with her spouse.

The acting district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal.

On motion, counsel states that the health problems of the applicant's spouse are so serious that he cannot accompany his wife to the Philippines. Thus, he will be deprived of his marital relationship. Counsel states that the there is an emotional necessity for the applicant and his wife to live together and the Service failed to give appropriate weight to the consequence of family separation. Counsel states that the Court emphasized the importance of family separation in a recent decision of the Ninth Circuit Court of Appeals in Salcido-Salcido v. INS, 138 F.3d 1292 (9th Cir. 1998), the Court held that "when the BIA fails to give "considerable, if not predominant weight" to the hardship that will result from family separation, it has abused its discretion."

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as an after-acquired family tie in Matter of Tijam, Interim Decision 3372 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter attempted to procure admission into the United States by fraud in 1986, failed to appear for a removal hearing, caused a bond posted in her behalf to be breached and married her spouse in 1997. She now seeks relief based on that after-acquired equity.

Counsel states that the Service erroneously concluded that the applicant's initial fraud and her failure to appear at a removal hearing are greater negative factors than the equities presented. The Service followed case law in making the determination that the applicant's equities can be given less weight because they were gained after the applicant's above described actions.

Counsel states that the applicant retained the service of a travel agent and understood that they would take care of the airline ticket and all other matters relating to her visit to the United

States. Counsel states that the applicant hired an attorney who was supposed to handle her case and she had no intention of hiding. The applicant's passport contains a counterfeit nonimmigrant visitor's visa (she admits under oath that she paid 45,000 pesos for it from a person named Manny) which normally would indicate that she has a residence in a foreign country which she has no intention of abandoning and who is visiting temporarily for pleasure. The mere fact that the applicant failed to make a timely departure at the conclusion of her temporary visit and she has remained since that time suggests that her intentions were to remain in the United States.

Counsel states that the applicant's only relative at entry was in New York and after the deferred inspection she went to stay with her sister in New York. The record shows that the applicant was paroled into the United States on February 18, 1986 for exclusion proceedings and she listed [redacted] as her address in the United States. The record also indicates that she was represented by a local San Francisco attorney who is listed as the obligor for the $1,000 Exclusion Bond posted in her behalf. The applicant failed to appear for the hearing and her case was administratively closed on August 4, 1986 until such time as she is located and the case is presented for recalendaring and further proceedings.

The record reflects that the applicant attempted to procure admission into the United States in February 1986 by presenting a counterfeit nonimmigrant visa. She was placed in exclusion proceedings in California, listed a California address, but went to New York where she remained until 1997 living with her sister who allegedly supported her. The record fails to contain evidence that she provided the Service with a New York address. The applicant stated under oath on March 30, 1998 that "I was able to get in touch with the San Francisco attorney in 1993, he changed the address." The applicant then learned that her case had been closed. The applicant states that she returned to California in June 1996 for a visit, met her future husband and got married in May 1997.

It is clear from the record that the applicant provided the Service and her attorney a California address in 1986 and then she travelled to New York to live with her sister for the next 10 years. She did not give her San Francisco attorney the New York address until 1993 rendering it impossible for him to surrender her for the exclusion hearing. The applicant's failure to reside at the address she provided the Service and her attorney clearly explains why she did not receive any notice regarding the hearing as suggested by counsel. After returning to California in 1997, the applicant engaged her present counsel.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

(C) MISREPRESENTATION.-

(i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Sections 212(a)(6)(C) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. There is no longer any alternative provision for waiver of a § 212(a)(6)(C)(i) violation due to passage of time. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See Matter of Soriano, Interim Decision 3289 (BIA, A.G. 1996).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George and Lopez-Alvarez, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

In 1986, Congress expanded the reach of the ground of inadmissibility in the Immigration Marriage Fraud Amendments of 1986, P.L. No. 99-639, § 6(a), 100 Stat. 3537, redesignated as § 212(a)(6)(C) of the Act by the Immigration Act of 1990 (Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat. 5067). In 1986, Congress imposed the statutory bar on (a) those who made oral or written misrepresentations in seeking admission into the United States; (b) those who have made material misrepresentations in seeking entry admission into the United States or "other benefits" provided under the Act; and (c) it made the amended statute applicable to the receipt of visas by, and the admission of, aliens occurring after the date of the enactment based on fraud or misrepresentation occurring before, on, or after such date. This feature of the 1986 Act renders an alien perpetually inadmissible based on past misrepresentations.

In 1990, § 274C of the Act, 8 U.S.C. 1324c, was inserted by the Immigration Act of 1990 (P.L. 101-649, Nov. 29, 1990, 104 Stat. 5059), effective for persons or entities that have committed violations on or after November 29, 1990. Section 274C(a) provided penalties for document fraud stating that it is unlawful for any person or entity knowingly-

> (2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act,...(or to obtain a benefit under this Act). The latter portion was added in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

In 1994 Congress passed the Violent Crime Control and Law Enforcement Act (P.L. 103-322, September 13, 1994), which enhanced the criminal penalties of certain offenses, including 18 U.S.C. 1546:

> (a)...Impersonation in entry document or admission application; evading or trying to evade immigration laws using assumed or fictitious name...knowingly making false statement under oath about material fact in immigration application or document....
>
> (b) Knowingly using false or unlawfully issued document or false attestation to satisfy the Act provision on verifying whether employee is authorized to work.

The penalty for a violation under (a) increased from up to 5 years imprisonment and a fine or both to up to 10 years imprisonment and a fine or both. The penalty for a violation under (b) increased from up to 2 years imprisonment or a fine or both to up to 5 years imprisonment or a fine, or both.

In 1996, Congress expanded the document fraud liability to those who engage in document fraud for the purpose of obtaining a benefit under the Act. Congress also restricted § 212(i) of the Act in a number of ways with the recent IIRIRA amendments. First, immigrants who are parents of U.S. citizen or lawful permanent resident children can no longer apply for this waiver. Second, the immigrant must now show that refusing him or her admission would cause extreme hardship to the qualifying relative. Third, Congress eliminated the alternative 10-year provision for immigrants who failed to have qualifying relatives. Fourth, Congress eliminated judicial review of § 212(i) waiver decisions, and Fifth, a child is no longer a qualifying relative.

The record contains correspondence dated April 1986 which reflects that the applicant was charged with a violation of 18 U.S.C. 1028 (a felony). 18 U.S.C. 1028 relates to fraud in connection with identification documents and was amended by IIRIRA to raise the maximum term of imprisonment from 5 to 15 years.

After reviewing the amendments to the Act and to other statutes regarding fraud and misrepresentation from 1957 to the present

time, and after noting the increased impediments Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar and eliminating children as a consideration in determining the presence of extreme hardship, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud and misrepresentation related to immigration and other matters.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from § 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez, Interim Decision 3272 (BIA 1996).

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act include, but are not limited to, the following: the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

In Perez v. INS, 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship.

The court held in INS v. Jong Ha Wang, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record as of June 1997 reflects that the applicant's spouse, (hereafter referred to as [redacted] was employed full-time at [redacted] Inc. [redacted] had been divorced for nearly 15 years, had two children from that marriage, suffers from coronary artery disease with multiple angioplasties and stent which last occurred in September 1998 and is a diabetic. He is taking multiple medications and requires coordination of care between different physicians. [redacted] states that he has a very close relationship with his two adult children. [redacted] states that he would have to chose between his wife and his children and that is a choice that no human being should have to make. [redacted] states that it would be difficult to leave the medical care in this country and move to the Philippines. Allan states that, although his wife is a licensed medical physician, she cannot replace the experienced team of physicians who treat her husband's complicated condition.

There are no laws that require a United States citizen to leave the United States and live abroad. [redacted] is employed in the United States, has a history of health problems that pre-date his meeting his present spouse, has two adult children living in the United States who could assist him, and his roots are in this country. He is not required to leave and go to the Philippines. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. See Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994). In Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

Although [redacted] has medical problems, he is under the care of a team of competent physicians, is taking the prescribed medications, and is able to work full-time as a result. A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative would suffer extreme hardship over and above the normal economic, emotional and social disruptions involved in the removal of a family member.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as she may by regulations prescribe.

In Matter of Cervantes-Gonzalez, the Board also held that the underlying fraud or misrepresentation may be considered as an adverse factor in adjudicating a § 212(i) waiver application in the exercise of discretion. Matter of Tijam, Interim Decision 3372 (BIA 1998), followed. The Board declined to follow the policy set forth by the Commissioner in Matter of Alonso, 17 I&N Dec. 292 (Comm. 1979); Matter of Da Silva, 17 I&N Dec. 288 (Comm. 1979), and noted that the United States Supreme Court ruled in INS v. Yueh-Shaio Yang, 519 U.S. 26 (1996), that the Attorney General has the authority to consider any and all negative factors, including the respondent's initial fraud.

In its analysis conducted in Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), a § 212(i) matter, the BIA found cases involving suspension of deportation and other waivers of inadmissibility to be helpful given that both forms of relief require extreme hardship and the exercise of discretion. The BIA continued in Cervantes-Gonzalez to state that, "Although extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered." See Matter of Mendez, Interim Decision 3272 (BIA 1996). The Associate Commissioner is bound by that decision.

The favorable factors include the applicant's family tie, the absence of a criminal record, and general hardship to the qualifying relative.

The unfavorable factors include the applicant's attempt to procure admission into the United States by fraud in 1986, her providing a California address to the Service and to her attorney and then absconding to New York where she remained for at least 10 years and did not notify her attorney of that New York address until 1993, her failure to surrender for the exclusion hearing, her causing a bond to be breached, and her lengthy unauthorized stay in the United States.

The Board stated in Matter of Cervantes-Gonzalez, that United States Supreme Court ruled in INS v. Yueh-Shaio Yang, that the Attorney General has the authority to consider any and all negative factors, including the alien's initial fraud, in deciding whether or not to grant a favorable exercise of discretion. The Associate Commissioner does not deem it improper to give less weight in a discretionary matter to an alien's marriage which was entered into in the United States following a fraudulent entry and after a period of unlawful residence in the United States as opposed to a marriage initially entered into abroad followed by a fraudulent entry.

In the latter scenario the alien who marries abroad legitimately gains an equity or family tie which may result in his or her obtaining an immigrant visa and entering the United States lawfully even though the alien may fraudulently enter the United States after the marriage and before obtaining the visa. Whereas in the former scenario the alien who marries after he or she fraudulently enters the United States and resides without Service authorization does gain an after-acquired equity or family tie that he or she was not entitled to without the perpetration of the fraud.

Notwithstanding that the decision in Carnalla-Muñoz v. INS, related to an alien in removal or deportation proceedings, the alien's equity was gained subsequent to a violation of an immigration law, and when considering an issue as a matter of discretion an equity gained contrary to law should receive less weight than an equity gained through legal and legitimate means.

The applicant's actions in this matter cannot be condoned. The unfavorable factors in this matter outweigh the favorable ones. In proceedings for application for waiver of grounds of inadmissibility under § 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the order dismissing the appeal will be affirmed.

ORDER: The order of November 26, 1999 dismissing the appeal is affirmed.